IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

L.Rs. Mst. Keshar & ors.	vs.	L.Rs.Smt. Gomani & anr.

S.B. Civil Second Appeal No.90/1982 against the judgment and decree dated 23.2.1982 passed by the learned District Judge, Dungarpur in Civil Appeal No.28/80.

Date of Order: November 08, 2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. A.K. Rajvanshy for the appellants.
Mr. Anuj Sahlot for Mr. Mridul Jain for respondent No.1.
Mr. B.N. Calla for respondent No.2.

BY THE COURT:

Brief facts of the case are that plaintiffs Smt. Gomani and Jetha Lal filed a suit against the defendants-Smt. Keshar and six others for possession of house in dispute and recovery of ornaments and utensils. It appears from the facts of the case that some property of Dalji Khatik is situated at Sagwara in the State of Rajasthan. Smt. Dhannu is wife of Dalji and they had two daughters, Smt. Gomani-plaintiff no.1 and Smt. Keshar defendant no.1. According to the plaintiffs, Smt. Gomani and her son Jetha, Smt. Dhannu widow of Dalji executed Will in favour of the plaintiffs on 1.8.1972 and it was got registered on 17.8.1972. Smt.

Dhannu expired on 15.6.1973. After the death of Smt. Dhannu, the plaintiffs obtained the probate for the Will dated 1.8.1972. The probate certificate was issued on 31.5.1975, copy of which is placed on record as Ex.2. The plaintiffs alleged that at the time of last rites of Smt. Dhannu at burial ground, the ornaments which Smt. Dhannu was wearing and mentioned in para no.3 of the plaint were given to defendant no.6 by defendants no.2 to 5. These ornaments have not been returned to the plaintiffs who are entitled to receive these ornaments from defendant no.6 as Smt. Dhannu gave all his properties to the plaintiffs by the Will mentioned above. The plaintiffs further alleged that on 29.6.1973, the defendant no.1 to 6 dispossessed the plaintiffs from the house in dispute, upon which the plaintiffs left the village and went to Dungarpur where they were residing. It is alleged that the house-holds goods were lying in the house. They also, by virtue of Will dated 1.8.1972, came in the ownership of the plaintiffs. According to the plaintiffs, the defendants no.1 to 6 put the defendant no.7 in possession of the house, who also has no right to remain in possession, therefore, the plaintiffs filed the suit for recovery of the possession of the house and for recovery of the goods mentioned in the suit. The suit was filed on 28.1.1976.

The defendants submitted written statement and stated that the

proper court fee was not paid for the probate certificate and the probate was obtained illegally and unauthorizedly. The defendants submitted that no ornaments were removed from the body of the deceased Smt. Dhannu and after denying the facts as alleged by the plaintiffs, the defendants submitted that in fact, Smt. Dhannu executed a Will in favour of plaintiff no.1 Smt. Gomani and in favour of Smt. Keshar and the possession of the house was handed over to plaintiff no.1 and defendant no.2 at that time. According to the defendants, the said Will is in possession of the plaintiff Smt. Gomani. In addition to above, the defendants submitted that the Will dated 1.8.1972 is forged one and the defendant no.1 was in possession of half of the house and she already gifted the house to 'Panch' (of the village Sagwara). Rejoinder was filed by the plaintiffs denying the allegations of the defendants.

The trial court framed as many as seven issues. The issues are whether Smt. Dhannu had no son and she executed a Will in favour of the plaintiffs on 1.8.1972, whether the ornaments mentioned above were removed by defendants no.2 to 5 and were handed over to defendant no.6 and whether defendant no.1 to 6 forcibly dispossessed the plaintiffs from the house in dispute and whether the defendants no.1 to 6 gave the house to defendant no.7 for residing and what is the effect of the gift-deed executed by defendant Smt.Keshar. The trial

court decided issue no.1 in favour of the plaintiffs and held that in view of the Will Ex.1, the plaintiffs became the owner of the property. While deciding issue no.2, the trial court held that the ornaments which were on the body of deceased Smt.Dhannu at the time of last rites of Smt. Dhannu, belongs to the plaintiffs and they are entitled to recover those goods from the defendants. Issues no.3 and 4 were also decided in favour of the plaintiffs and the trial court held that the first Will set up by the defendants was cancelled by Smt.Dhannu and she executed subsequent Will dated 1.8.1972 which is the last Will of the deceased. The trial court decreed the suit of the plaintiffs holding that the plaintiffs are the owner of the property and are entitled to take possession back from the defendants. The trial court also cancelled the gift-deed executed by defendant no.1 Smt. Keshar.

Being aggrieved by the judgment and decree of the trial court dated 31.7.1980, the defendants preferred appeal. The first appellate court after holding the findings on all issues except issue of right to recover the ornaments and goods from the defendants, partly allowed the appeal of the defendants maintaining the decree for possession of the disputed property. Being aggrieved by the judgments, the appellants-defendants preferred this appeal and the plaintiffs submitted cross-objection against the finding recorded by the first appellate court

on issue no.2 by which the first appellate court dismissed the plaintiffs' suit for recovery of the ornaments.

Following substantial questions of law were framed by this Court while admitting the appeal on 19.7.2002:-

> "(1) Whether the first appellate court was right in holding that Smt. Dhannu widow of Dalla was entitled in law to dispose of the entire property left by Dalla by means of a Will ?
>
> (2) Whether on the coming into force of the Hindu Succession Act, 1956, the daughters of Dalla, deceased also became co-owners of the property left by Dalla along with his widow Smt. Dhannu ?
>
> (3) Whether the first appellate court was justified in allowing the defendant-respondent full costs of the trial court."

According to the learned counsel for the appellants, it is admitted case that the property was ancestral and the plaintiff no.1 and defendant no.1,namely, Smt. Gomani and Smt. Keshar are the daughters of deceased Dalji, therefore, both the daughters also became the owner of the property left by Dalji and they became co-owners with Smt. Dhannu-their mother. In view of the above legal position, plaintiff no.1 and defendant no.1 both had 1/3rd share and Smt. Dhannu had 1/3rd share in the entire property.Smt. Dhannu could have bequeathed the

property to the extent of 1/3rd only. According to the learned counsel for the appellant, Section 8 of the Hindu Succession Act, 1956 provides equal shares for the widow and the daughters. It is also submitted that in this case, Dalji expired before coming into force of the Act of 1956 but by virtue of Sections 8 and 14 of the Act of 1956, even the limited owner and the daughters or female who were in possession, they became the absolute owners of the property. In view of the above, plaintiff no.1 and defendant no.1 got 1/3rd share and Smt. Dhannu got 1/3rd share. According to the learned counsel for the appellants, in view of the above legal position substantial questions no.1 and 2 deserve to be decided in favour of the appellants and the decree for possession of the entire house cannot maintain.

I considered the submissions of the learned counsel for the parties and perused the reasons given by the two courts below as well as Sections 8 and 14 of the Hindu Succession Act, 1956 and also perused the record.

It appears from the pleadings of the parties that the plaintiffs' case was that Smt. Dhannu executed Will in favour of plaintiffs whereas defendants pleaded that Smt. Dhannu executed an earlier Will in favour of plaintiff no.1 and defendant no.1 and she gave possession of the

property to plaintiff no.1 and defendant no.1 at the time of execution of the Will. It is also not in dispute that Dalji died before coming into force of the Act of 1956.From the plaint and the written statement, it is clear that the plaintiff no.1 and defendant no.1 both were widows,therefore, they were married. The defendants impliedly admitted Smt. Dhannu as owner of the property and, therefore, claimed their title on the basis of Will executed by Smt.Dhannu, dated 17.8.1971. The defendants also admitted that Smt.Dhannu gave possession of the property to the plaintiff no.1 and defendant no.1, meaning thereby the defendants by implication admitted that at the time of death of Dalji and at the time of coming into force of the Act of 1956, Smt. Dhannu alone was living in the house in dispute, obviously as owner of the property or as widow having right to remain in possession and the estate can be said to be widow's estate. The question whether plaintiff no.1 and defendant no.1 were also in possession of the property in their own right or had right limited right at the time of coming into force of the Act of 1956, is a question of fact for which the defendant did not lay down any factual foundation. In the above situation, the admission of the defendant recognized Dhannu's right to bequeath the property by a Will, is an admission of fact that Smt. Dhannu was in possession of the property in dispute by which the widow of Dalji, Smt. Dhannu became absolute and sole owner of the property by virtue of

Section 14 of the Hindu Succession Act, 1956. There is no case of any of the parties that at the time of death of Dalji or even at the time of coming into force of Section 14 of the Act of 1956 any of the daughters plaintiff no.1 or defendant no.1 had limited ownership or they were in possession of the house. Therefore, none of two became owner of the property in dispute. Otherwise also preponderance of probabilities suggests that Smt. Dhannu alone was residing in the house and her right to bequeath the property was never questioned by either plaintiffs or by the defendants, therefore, in the facts of this case, it is held that Smt. Dhannu became full and sole owner of the property in dispute having right to bequeath the property by Will. The substantial question no.1 is decided accordingly.

Section 8 of the Hindu Succession Act, 1956 provides that the property of male Hindu dying intestate shall devolve according to the provisions of Chapter II of the Act of 1956 which makes the daughters also heirs of the deceased male Hindu but Section 8 is prospective in nature. In this case, since Dalji died before coming into force of the Act of 1956, therefore, the property devolved according to old Hindu Law on death of Dalji. Section 14 of the Act of 1956 makes the female heir owner of the property provided the property is possessed by the female Hindu. In this case, since it is admitted case of both the parties that

Smt.Dhannu was alone in possession of the property at the time of coming into force of Section 14 of the Act of 1956, therefore, also Smt. Dhannu alone became the owner of the property and plaintiff no.1 and defendant no.1 were also either limited owner nor had any right in the property which could have been converted into full ownership rights, therefore, substantial question no.2 is also decided against the appellant.

So far as award of cost of the suit is concerned, I do not find any reason to interfere in the discretion exercised by the courts below.

By filing cross-objection, the plaintiff challenged the finding of the first appellate court by which the first appellate court disallowed the plaintiffs' claim for the recovery of the goods. The finding has been challenged on the ground that the first appellate court committed mistake in calculating the period of limitation. According to the plaintiffs, ornaments were removed from the body of the deceased Smt.Dhannu on 15.6.1973 and the suit was filed on 28.1.1976 but the learned Judge of the first appellate court under impression that the suit was filed on 16.10.1976 which is in fact the date of filing of the written statement by the defendants, held the suit barred by time therefore, the finding of the first appellate court is erroneous. It appears from the

reasons given by the first appellate court while deciding issue no.2 the first appellate court has not dismissed the plaintiffs' claim only on the ground of limitation but recorded finding against the plaintiffs on merit, therefore, that finding of fact cannot be interfered which appears to be just and proper in the light of the evidence of the parties. Therefore, there is no force in the cross-objection.

In view of the above discussion, the appeal as well as the cross-objection are dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.